No. 12124

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,
Appellant,
vs.
W. R. CHAMBERLIN CO., a corporation,
Appellee

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellee.
603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 12124

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE,
Appellant,
vs.
W. R. CHAMBERLIN CO., a corporation,
Appellee

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
EDW. S. FRANKLIN,
Proctors for Appellee.
603 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

STATUTES

TEXTS

In The United States Court of Appeals
For the Ninth Circuit

DALE MENEFEE, *Appellant*, vs. W. R. CHAMBERLIN CO., a corporation, *Appellee*.	No. 12124

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant, a seaman, joined the SS ROBERT PARROT at Olympia, Washington on December 20, 1946, on a voyage to Japan, China, South Africa and return to the United States. The voyage terminated at Baltimore, Maryland, on September 8, 1947. Appellant missed the vessel at Cape Town, South Africa on July 3, 1947, and was subsequently returned to the United States on the SS ROBIN GOODFELLOW, reaching New York on August 3, 1947.

When the vessel left Olympia, Washington, new mooring lines for the stern of the vessel were taken aboard and secured to the bulwarks. It was necessary that eyes be spliced on the new lines enroute to Japan (Tr. 123).

There is some conflict of testimony as to the con-

dition of the weather after the vessel left Olympia, Washington, enroute to Japan. The course steered was a Southwest course of 225°. The vessel left Olympia, Washington, on January 1, 1947. Chief Mate Kloppenstein testified that the usual type of weather expected at that time of the year was encountered (Tr. 100) with the vessel taking seas over the bow and starboard side (Tr. 101).

On January 22, 1947, the weather became increasingly threatening and the Master of the vessel, deeming it unwise to permit the after mooring lines to remain secured to the after deck lest they be washed overboard and foul the propeller, ordered Chief Mate Kloppenstein to remove the same to the after deck house.

The Chief Mate visited the stern of the vessel to observe the mooring lines on two occasions shortly prior to ordering appellant and other seamen to accompany him. On one of these occasions the Master accompanied him on the tour of inspection. The vessel was then slowed down (Tr. 130) with just steerage way maintained and the vessel headed into the sea (Tr. 131). No seas were observed by the mate breaking over the stern.

Appellant and other seamen in the charge of the Chief Mate then proceeded to the after deck and while so engaged in chopping the lashings which secured the after mooring lines to the rail of the vessel, were struck by a sudden and unexpected freak wave, which engulfed the after deck of the vessel, throwing appellant and other seamen about and injuring

them. Later that afternoon, the after mooring lines were stowed in the after deck house without further incident (Tr. 91).

Appellant was treated by the Purser of the vessel for a badly bruised right leg and confined to his quarters until the vessel reached Yokohama, Japan, on January 27, 1947. At Yokohama and at Saipan, the next port of call, appellant was examined by shoreside military doctors. About the middle of February, 1947, after the vessel left Saipan enroute for Hongkong, appellant returned to work and stood all his usual sea watches until he missed the vessel at Cape Town, South Africa, on July 3, 1947. During this period he was favored when possible by the Chief Mate and given lighter work (Tr. 136).

NATURE OF APPELLANT'S LIBEL

On or about November 13, 1947, appellant filed a libel in *personam* against appellee, W. R. Chamberlin & Co., a corporation, operators of the SS ROBERT PARROT, stating two causes of action. The first cause of action was laid under 46 U.S.C.A., §688, known as the Jones Act. The negligence pleaded was the failure of the officers of the vessel to remove the after hawser from the fantail or stern of the vessel before the vessel encountered heavy seas. Appellant's second cause of action was based upon his wrongful abandonment in Cape Town, South Africa. This second cause of action has been waived by appellant except for the claimed recovery of the sum of $35.31, which appellee deducted from appellant's wages to reim-

burse it for appellant's expenses in Cape Town after missing the vessel.

In the trial of the case, appellant, and his three witnesses, Bernard R. Englund, Oliver M. Jacobson and Peter C. Mydske, testified orally. Appellee's witnesses, Chief Mate Kloppenstein, Purser Keith M. Brown and Herman M. Hermanson, testified by deposition. After the trial, the court entered a decree dismissing both causes of action with prejudice.

FINDINGS OF THE DISTRICT COURT

In dismissing appellant's first cause of action based upon negligence, the lower court entered the following findings:

II.

> "That the injuries sustained by libelant were not due to any negligence on the part of the respondent but were due to perils and hazards of the sea in that the libelant was injured by being struck by a huge wave which engulfed the stern of the vessel where he was working." (Aps. 10, 11)

With reference to appellant's second cause of action for alleged abandonment, the court entered the following finding:

V.

> "That Menefee's failure to join the vessel was due to his own misconduct and not caused by any act of the vessel or its officers in abandoning him." (Aps. 11)

WEIGHT TO BE ACCORDED FINDINGS IN THE DISTRICT COURT

Where the trial in the lower court in an admiralty appeal is heard both upon oral and deposition testimony, the rule announced by this court is that the court will give to the findings of the lower court such weight as its judicial discretion dictates.

Matson Navigation Company v. Pope & Talbot, 149 F.(2d) 615;

United States v. Lubinski, 153 F.(2d) 1013.

Kawada v. United States, 116 F.(2d) 615.

APPELLANT'S INJURIES PROXIMATELY DUE TO UNANTICIPATED FREAK WAVE

On leaving Olympia, Washington, the vessel steered the usual southerly course employed during winter months destined to take it in the vicinity of 25° to 30° North Latitude (Tr. 122). As projected, this latitude would place the vessel opposite the Coast of Mexico. The Chief Mate stated that a week out of Olympia, Washington, they encountered "moderately heavy weather and usual heavy seas" (Tr. 101). The seas were breaking over the forward and starboard side of the vessel just before appellant's injury. Kloppenstein, the Chief Mate, before ordering appellant and his watch to the fantail or stern to stow the mooring lines, made two trips to this region and observed that no seas were coming over the stern (Tr. 104). Appellant and several other seamen were then turned to and engaged in cutting the lines secur-

ing the mooring lines with axes. What then occurred is best graphically described by Chief Mate Kloppenstein:

> "Answer: Well, I brought—I took the men aft and stationed them at intervals to handle the line as quickly as possible, and opened the port passageway door and started to cut the lashings. I had cut one through and had started to cut the second one and there was a tremendous sea—a series of tremendous seas at that particular time—it started the vessel pitching heavily and the Captain had already slowed the vessel down after we went aft—and it didn't seem to be dangerous at that time, but suddenly, this one of these heavy seas came up—the vessel seemed to back squarely into the sea—it stopped—it actually didn't, but it seemed that way. Water came over from both sides and the stern, and washed everyone forward against the deckhouse.
>
> "Question: Now, after the sea came over—was that only one sea?
>
> "Answer: Only one sea." (Tr. 104, 105)

Oliver Jacobson, appellants' witness, corroborated Chief Mate Kloppenstein as follows:

> "Q What happened when you got outside?
>
> "A Well, we just got around to the stern and started cutting the line so we could drag it in and a wave came along.
>
> "Q How big a wave?
>
> "A Well, it was up to the gun tub.
>
> "Q It engulfed all of you, did it?
>
> "A Yes." (Tr. 82)

Appellant did not see the wave which struck him (Tr. 44).

After a twenty-minute wait for the seas to spend their fury, it was necessary for Mydske to return to the fantail with other seamen and work approximately two or three hours before the lashings were cut and the lines were stowed away (Tr. 91).

IT HAS LONG BEEN RECOGNIZED THAT THE SEAMAN ASSUMES THE RISKS NORMALLY INCIDENT TO HIS PERILOUS CALLING

The Iroquois, 194 U.S. 240, 48 L. ed. 959;

The Arizona v. Anelich, 298 U.S. 110, 80 L. ed. 1085.

The most constant of these hazards as reflected in litigation of this type are the unpredictable vagaries of the wind and the seas.

This court recognized the non-liability of the vessels for injuries to a seaman caught by a huge wave unexpectedly sweeping over the vessel in the case of *The Cricket* (1934) 71 F.(2d) 61, where the court said at page 63:

> "(2) The life of a seaman is hard. The nature of his calling subjects him to many dangers. One of these is the hazards of a heavy sea. The sailor knows this and assumes the risks incidental to his calling. In *Maloney, etc., v. U. S.*, 7 F. Supp. 15, 1928 A.M.C. 288, the deceased was struck by a heavy wave (the first to come on deck), which threw him down a stairway causing injuries from which he died. It was held that the accident was due to natural perils of navigation, which Maloney assumed."

A similar view was taken in the later case decided by this court, *Matson Navigation Company v. Hansen* (1942) 132 F.(2d) 487, where the court said at page 488:

> "(2, 3) The complaint invokes the provisions of the Jones Act, 46 U.S.C.A. §688, and the question is whether the place in which appellee was required to work was reasonably safe in the circumstances existing at the time. Obviously, the test of reasonable safety varies with the prevailing conditions. No liability flows from requiring a sailor to perform his necessary sailor's duties with the ship rolling and lurching in a heavy storm, even though he may be injured from a fall caused by a wave sweeping across the deck. * * *"

The rule of non-liability of the vessel for injuries caused to seamen by reason of heavy weather was also followed in the case of *Maloney v. United States*, 7 F. Supp. 14, where United States District Judge Goddard of the New York District Court dismissed the libel for the following reasons:

> "In view of all the circumstances, the size of the ship, that the deck where Maloney was working was 30 to 35 feet above the sea level, that it was not unusually heavy weather, and the uncontradicted testimony that, while spray had come aboard during that morning, this was the first wave to come aboard, it cannot fairly be said that Maloney was ordered to work in an unsafe place, or that there was negligence in failing to bring the ship up into the wind while the 'save-alls' were being put up. Looking back, it does not appear that any one did anticipate that such

a wave would come aboard during that time, or that it should have reasonably been anticipated. It was a most unfortunate occurrence, but the result does not warrant holding that those in command were lacking in their exercise of care and judgment for the protection of the crew. * * *

"* * *

"(3) The conclusion from all the evidence is that Maloney's death was due to the natural perils of navigation, a risk which a seafaring man himself assumes. *The Robert C. McQuillen* (D.C.) 91 F. 685, 35 Cyc. p. 1244 and cases cited, and the libel must therefore be dismissed."

Similarly, in the case of *Kleffman v. Dollar Steamship Lines*, 1933 A.M.C., 471, in a decision of the United States District Court, for the Northern District of California, the holding was:

" 'It would appear that the cause of the unfortunate accident was a heavy wave, commonly called a freak sea, which broke over the ship, and was entirely unexpected and could not have been reasonably anticipated.'

" 'Seamen must be held to assume the risk of injuries from any and all dangers ordinarily and naturally incident to the service. This case falls within that rule, and is not within any of its exceptions.' Judgment for defendant."

We feel that these authorities and the factual situation presented by the evidence adequately sustain the decision of the lower court in holding that the wave which injured appellant was unexpected and a freak wave, for the consequence of which no liability attaches to the appellee.

FAILURE TO STOW MOORING LINES PRIOR TO INJURY

Appellant seeks to spell out negligence on the part of the vessel because of the failure of the Boatswain to stow the after mooring lines prior to appellant's injury. Chief Mate Kloppenstein testified he had instructed the Boatswain to do so.

The record abounds with ample testimony that the after mooring lines were exceedingly well secured and lashed to withstand the expected winter weather in the South Pacific on the voyage to Japan. Appellant testified:

> "Q Did I understand you to say that that hawser on the fantail had been securely lashed before you left Olympia?
>
> "A Yes.
>
> "Q Did you then place additional lashings on it from time to time?
>
> "A Yes.
>
> "Q And at the time that you went out to remove it, was it securely lashed?
>
> "A Yes, it was.
>
> "Q Where was it placed with reference to the fantail?
>
> "A It was lashed on the port end of the fantail.
>
> "Q What was it lashed to,—the bulwarks or some cleats?
>
> "A The railing on the bulwarks and to the cleats on the gunwhale." (Tr. 40, 41)

It is to be recalled that when the attempt was made to stow the after mooring lines in the deck house at

the time of appellant's injury, it was necessary to use an ax to chop the lashing to free them.

This factual situation materially differs from the circumstances in two cases relied upon, particularly by appellant, *The William A. McKenney*, 41 F.(2d) 754, and *Ludwig v. United States*, 74 F. Supp. 29. In both of these cases, the deck cargo was improperly secured to withstand heavy weather and the seamen were injured in attempting to rectify this condition.

Furthermore, Chief Mate Kloppenstein testified that it was usual and customary to carry the after hawser secured to the after deck:

> "Q As a matter of fact, it isn't necessary to carry this hawser like the Boatswain lashed this to the rail?
>
> A We carried them that way on other ships. (Tr. 126)

Appellant's witness, Mydske, similarly testified as follows:

> "Q In other words, the hawser was as well secured as could be expected under ordinary circumstances?
>
> "A It would have been better if it was below.
>
> "Q No, I say insofar as ordinary circumstances were concerned it was well secured?
>
> "A Yes,—ordinary circumstances." (Tr. 93, 94)

FREAK WAVE NOT FORESEEABLE

Before the failure of the Boatswain to stow the after mooring lines before appellant's injury can be denominated negligence, it must appear that the dam-

age suffered by appellant was reasonably foreseeable. Unforeseeable consequences of a tortious act are not the natural and probable results of such act within the rules of proximate cause.

This court has recognized this rule in the recent case of *Sundberg v. Washington Fish & Oyster Co.* (1943) 138 F.(2d) 801 (C.C.A. 9), where the court said:

> "Proof of negligence on the part of the shipowner involves at least a showing that under existing circumstances the shipowners or his agents should reasonably have anticipated the danger of bodily injury to a member of the crew. * * * citing cases."

This rule has been uniformly applied by various Circuit Courts to Jones Act actions.

> "There is no actionable liability for an alleged negligent act unless injury resulting therefrom could have been foreseen in the light of the attending circumstances. Indeed, it may be said that, in the absence of wanton wrong or some failure to conform to some arbitrary or absolute standard of care 'foreseeability' is a necessary test of the existence of negligence, and, if no injury can reasonably be expected to result, there is no negligence."
>
> *Johnson v. Kosmos Portland Cement Co.* (C. C.A. 6) 64 F.(2d) 193.

> "But we think the court committed a more fundamental error in not directing a verdict for defendant for want of substantial negligence in respect of both causes of action. In neither were facts shown which would lead the defendant to anticipate the danger of injury to its seamen by

virtue of the existing condition of the ship's appliances."

Pittsburg S.S. Co. v. Palo (C.C.A. 6) 64 F. (2d) 198.

"It was not an insurer, being liable only if the injury was reasonably foreseeable. It could not, however, have foreseen that libelant would walk into the pile of retarders just at the moment the lights went out. It follows that the court below was right in holding that there was no evidence of negligence imputable to respondent."

Calmar S.S. Corporation v. Taylor (C.C.A. 3) 92 F.(2d) 86.

Since the evidence affirmatively establishes that the mooring lines were at all times adequately secured on the after deck after the Boatswain completed splicing the eye of the lines in view of weather and seas normally expected and actually experienced on the voyage, the sudden apprehensions of the Master many days later that the lines might be washed overboard if unexpectedly heavy weather was subsequently encountered and the concurrence of the unanticipated freak wave which washed over the vessel were circumstances which could not reasonably have been anticipated or foreseen by the Boatswain at the time of his original neglect as the proximate result of his failure to stow the mooring lines.

HEAVY SEAS AN INTERVENING CAUSE

If the court is of the opinion that the Boatswain was guilty of negligence in not stowing the after mooring lines prior to appellant's injury, it is sub-

mitted that this act on the part of the Boatswain is too remote an incident to be considered as a proximate cause of appellant's injury. This was due to a new, active and efficient cause, namely the unanticipated breaking over the vessel of a freak wave.

> "An act which furnishes the opportunity for the infliction of an injury is not the proximate cause of the injury, where the latter occurs as the direct result of some intervening force. Thus, where a negligent act creates a condition which is subsequently acted upon by another unforeseeable, independent and distinct agency to produce the injury, the original act is the remote and not proximate cause of the injury, even though the injury would not occur except for the act. In such a case the law being concerned with proximate rather than the remote cause does not look beyond the cause of injury most recently operative in determining liability for the injury." 38 American Jurisprudence, Sec. 68, p. 725.

The United States Supreme Court has announced and applied this rule in a number of cases, the leading case being *Atchison T. & S. R. Co. v. Calhoun*, 213 U.S. 1, 53 L. ed. 671, where the court said:

> "Where in the sequence of events between the original default and final mischief an entirely independent and unrelated cause intervenes and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall 44, 52, 19 L. ed. 65, 67. *This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor.*" (Italics ours)

PHYSICAL DAMAGES SUSTAINED BY APPELLANT

Since the lower court dismissed the libel, no findings were made as to any damages. On the trial of the case, appellant stressed the fact that he was still somewhat incapacitated from an alleged injury to his back, although the testimony of Brown, the Purser, who took care of appellant after his injury on board the vessel (Tr. 143) and that of his shipmates, Englund (Tr. 73), and of Jacobson (Tr. 84), indicates that the only injury sustained was to his right leg. Furthermore, the libel filed October 22, 1947, alleges only an injury to appellant's right leg resulting from his accident.

Brown, the Purser and Pharmacist's Mate, stated he treated appellant until the vessel reached Yokohama on January 27, 1947, where he had an Army doctor examine appellant. A subsequent medical examination occurred at Saipan in the middle of February, 1947. Appellant thereupon resumed his regular sea watches until he missed the vessel in Cape Town, South Africa, in July, 1947. During this four-month period, he neither asked for nor received any further medical treatment either from Brown, nor did he seek to have any further medical examinations or treatment at the numerous ports touched at by the vessel enroute from Saipan to Cape Town.

Furthermore, the evidence establishes that since the return of appellant to the United States in August, 1947, and to the time of the trial of the case on August 17, 1948, appellant had not received any medical treatment, although the same was available to him gratuitously at any United States Marine Hospital.

In the trial of the libel, appellant called no physician to corroborate any claims of temporary or permanent physical disability incurred by him as the result of his accident.

Appellant's unsubstantiated assertion as to his physical condition must be considered in the light of his admission that since childhood he has been afflicted with a nervous disease. It would seem more appropriate to assign his subjective complaints of pain made at the trial as springing from this emotional instability rather than the effects of his injury in view of his work record of almost four and a half months and his failure to have any medical treatment since February, 1947, or present any medical testimony for the guidance of the court in the trial of the libel.

It is respectfully suggested that in the event of a reversal of the lower court's decision that the matter of the damages, if any, to which appellant is entitled, should be referred back to that tribunal for appropriate findings.

In *Walsh's Case*, 63 F. Supp. 421, referred to in appellant's brief, there was ample expert medical testimony offered establishing permanent injury to the bony structure of the back. Here, no such testimony was offered and there is very grave doubt whether appellant received any back injury, as presently claimed by him at the time of his accident. The award of any substantial damages would, of necessity, be based on speculation and conjecture in the record presented to this court.

APPELLEE ENTITLED TO REIMBURSEMENT FOR APPELLANT'S SUBSISTENCE IN CAPE TOWN

The evidence establishes that appellee was required to pay the sum of $35.31 for the costs of appellant's subsistence after missing the vessel in Cape Town, until he could be repatriated on the SS. ROBIN GOODFELLOW.

The circumstances surrounding the missing of the vessel by appellant are recounted in part by his letter of August 30, 1947 (Respondent's Exhibit A-3) addressed to appellee, reading in part as follows:

> "Being as I had picked up a girl, had decided to spend the night with her, believing that I did not half to be back to the ship until 8 o'clock the next morning.
>
> "As is were did not get back to the docks until 8:30 o'clock next morning discovering that during my absent the ship had left.
>
> "I thought maybe at the time the ship had shifted to another dock so had Cabbie drive to most of the docks—but no ship—so I called the American Council at around 9 o'clock but his secretary said he had not arrived at the office yet so I hung up.
>
> "There were a C-4 type ship in the harbor tried to go aboard her to ask information from some one in authority, as to what I should do but were not aloud aboard her—so didn't get no information.
>
> "At the time I did not know that I could of gotten this information from the Port Captain.
>
> "Being excited and nervous I gave up trying to find my ship beliving that it had left for good,

> so I did not report to the American Council until the following day."

The record further establishes that about 9:00 A.M. on the morning appellant failed to rejoin the vessel, the vessel left its pier and waited in the stream at Cape Town for appellant. The Purser was sent ashore to search the town for him. The vessel waited for appellant until 1:00 P.M., causing additional delay and expense to the vessel. While appellant testified that he reported to the American Consul on the morning of his failure to join the vessel, his letter indicates to the contrary.

> "Being excited and nervous I gave up trying to find my ship beliving that it had left for good, so I did not report to the American Council until the following day."

Appellant claims that Title 46 U.S.C.A. Section 678, 34 Stat. 100, reading as follows, is applicable:

> "It shall be the duty of the consuls and vice consuls, from time to time, to provide for the seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the Secretary of State shall give. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities."

Appellant then cites as authorities cases disallowing a credit to the Master of the vessel for seamen whom the Master himself has imprisoned in foreign ports,

and where the vessel has been obliged to pay for their subsistence. Obviously, these authorities are inapt in a situation where the misconduct of the seaman causes damage to the vessel, such as occurred in this case.

The right of the ship to recoupment in such circumstances has long been recognized in the admiralty law. In the recent case of *Shilman v. United States*, 164 F.(2d) 649, the court said:

> "(2) The cases cited by the appellees in support of a set off of $200 all fall within the category of expenses incurred on behalf of the ship in connection with the voyage. Sometimes they have related to hiring a substitute for a deserting seaman or for securing his return; sometimes for making the vessel good out of a seaman's wages for medical expenses occasioned by his assault on a member of the crew; at other times there have been deductions for a smuggling of goods which subjected the vessel to jeopardy or for allowing a stowaway to be on board. *Swanson et al. v. Torrey et al.*, 4 Cir., 25 F.(2d) 835; *The Ellen Little*, D.C. Mass., 246 F. 151; *The W. F. Babcock*, 2 Cir. 85 F. 978; *The T. F. Whiton*, D.C. S.D. N.Y., Fed. Cas. No. 13,849; *Snell et al. v. The Independence*, D.C. E.D. Pa., Fed. Cas. No. 13,139; *Scott v. Russell*, D.C. S.D. N.Y., Fed. Cas. No. 12,546; *Magee v. The Moss*, D.C. E.D. Pa., Fed. Cas. No. 8944."

In *Willard v. Dorr*, Fed. Cas. No. 17,680, in explaining the legal basis of permitting such deduction, Judge Story said:

> "* * * The set-offs allowed in the admiralty are principally those, in which advances have been made upon the credit of the particular debt

> or demand, for which the plaintiff sues; or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence; or as a restitution in value for damages sustained in consequence of gross violations of the contract for such services. * * *."

In *The T. F. Whiton*, Fed. Cas. No. 13,849, 23 Fed. Cas. page 873, the court said:

> "* * * That such an act on the part of a seaman, whereby the vessel suffers damage or is put to expense, is to be considered in diminution of a claim for wages, has often been held. *Scott v. Russell* (Case No. 12,546); *Brown v. The Neptune* (Id. 2,022); *The Tusker* (Id. 14,274)."

CONCLUSION

We respectfully submit that the decision of the District Court in denying the appellant a recovery is correct and that the District Court decision should be affirmed.

Respectfully submitted,

BOGLE, BOGLE & GATES,

EDW. S. FRANKLIN,

Proctors for Appellee.